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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 802

BETTILYON'S, INC., and NOLAN OSWALD, *Petitioners*

v.

STATE OF UTAH, by and through its Road Commission,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

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Bettilyon's, Inc., and Nolan Oswald pray that a writ of certiorari issue to review the judgment of the Supreme Court of Utah entered in the above-entitled case September 9, 1965.

CITATIONS TO OPINIONS BELOW

The Order of Involuntary Dismissal and Final Order of Condemnation of the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, are unreported and are printed in the appendix hereto, *infra* pp. 7-11. The opinion of the Supreme Court of Utah is reported in .... Utah 2d ...., 405 P. 2d 420, and is printed the appendix, *infra* p. 12.

JURISDICTION

The judgment of the Supreme Court of Utah was entered on September 9, 1965, (R. 118); *infra* p. 15. A timely petition for rehearing was filed on September 28, 1965. The petition was denied on September 29, 1965 (R 118). The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), as a right, privilege or immunity is specially claimed under the Constitution of the United States.

QUESTION PRESENTED

Whether the restriction of development for 3½ years of an entire parcel of property by the State of Utah, pending the final location of a Federal Interstate Highway somewhere on the property, constitutes a deprivation of property without due process of law when damages are awarded to the owners of the parcel only for property actually taken in a subsequent condemnation action and only from the date of the service of summons in such action.

CONSTITUTION AND STATUTE INVOLVED

The case directly involves the following:

The Fourteenth Amendment to the Constitution of the United States, which reads in part:

> "... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law. . . ."

Utah Code Annotated, 1953, Section 78-34-11, which in pertinent part provides:

> "For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued

at the date of the service of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed, as provided in the next preceding section. . . ."

STATEMENT OF THE CASE

This case involves a condemnation action brought by Respondents, State of Utah, by and through its Road Commission, on July 22, 1963, to condemn about 12 acres of an approximately 36 acre tract of land owned by Petitioners. The trial court refused to allow the jury to consider any items of damage or other costs and expenses incurred before the commencement of the condemnation action. The Utah Supreme Court affirmed the lower court's decision (R. 118). Petitioners now seek review of the decision of the Utah Supreme Court. The facts are not in dispute. They are essentially as found by the Utah Supreme Court in its opinion herein (R. 119). They reveal that Petitioners purchased a 36 acre tract of land in 1959 (R. 130). In June of 1960 a preliminary plat for a proposed subdivision was submitted by Petitioners to the Planning Commission of Salt Lake County (R. 225). This plat was subsequently approved (R. 225). Thereafter, in January, 1961, the Planning Commission notified the Respondent of the proposed subdivision (R. 119, 225). The Respondent informed the Planning Commission that some of the Petitioners' land would be needed for a right of way for the construction of a contemplated Federal Highway Project and requested that development of Petitioners' property be restricted in order to keep the proposed public investment in the area at a minimum (R. 119, 212).

The Planning Commission thereafter deferred action on Petitioners' final subdivision plat until June 1963 (R. 211, 220). Prior to final approval from the County Surveyor, Respondent commenced the condemnation action (R 226).

In the trial of this action the Federal question here sought to be reviewed was raised (R. 64).

A timely notice of appeal was filed with the Supreme Court of Utah, in which it was again asserted that the continuing restrictions imposed upon Petitioners' property as a result of the 1961 actions of Respondent acting through the Salt Lake County Planning Commission, constituted a deprivation of Petitioners' property without due process of law (R. 115-117).

The Utah Supreme Court affirmed the decision of the trial court without discussion of the Federal question raised by stating that the Utah Statute only authorizes compensation for "the actual value of the land on the date the summons is served or the land actually taken. . . ." The Court by stating that the Utah Statute only authorizes compensation of land actually taken is the market value of the land on that date, no more, and no less." (R. 119)

REASONS FOR GRANTING OF THE WRIT

I. The decision of the Utah Supreme Court is believed to be erroneous and in conflict with prior decisions of this Court.

It is well established that any substantial interference with private property which lessens its value, or which

abridges an owner's right to its use or enjoyment, is a taking in the constitutional sense, to the extent of damages actually incurred by the owner, even though the title or possession of the owner is not disturbed. *United States* v. *Causby,* 328 U.S. 256; *United States* v. *Dickenson,* 311 U.S. 745; and *Portsmouth Harbor L. and H. Co.* v. *United States,* 260 U.S. 327.

The holding of the Utah Supreme Court is to the effect that in Utah the protection of the Fourteenth Amendment is not available to citizens of that state until after the state has instituted a condemnation action, and that damage to property prior to that time may be regulated or eliminated by state statute alone. By affirming the trial court, the Utah Supreme Court has necessarily determined the question of deprivation of property without due process of law adversely to Petitioners.

The Utah Court has therefore held that under Utah statute there can be no eminent domain taking until service of summons or delivery of actual possession. The decision of the Utah Supreme Court substantially impairs rights guaranteed by the Constitution of the United States by ignoring the existence of that Constitution or by subordinating it to a state statute.

In the present case, Petitioners have been deprived of their right to use their property by Respondent's actions prior to the institution of the condemnation action. Regardless whether there was a physical taking, Petitioners' property was rendered less valuable, less useful and less desirable by the action of the State of Utah. Petitioners were forced to pay taxes and interest on their entire tract

during this period. As a result of Respondent's actions, Petitioners' property was made unproductive and unsaleable.

This interference with Petitioners' property constitutes a taking under the Federal Constitution for which Petitioners must receive compensation. To the extent that this unrecompensed taking has been authorized by the State of Utah and the Utah Supreme Court, it is in violation of the Fourteenth Amendment. *Fallbrook Irr. District* v. *Bradley*, 165 U.S. 112; *Missouri Pac. R. Co.* v. *Nebraska*, 164 U.S. 403; and *O'Neil* v. *Leamer*, 239 U.S. 244.

II. The question is important to all citizens of the State of Utah. If the decision of the Utah Supreme Court is allowed to stand, then the State of Utah will be allowed to abridge the constitutional rights of the citizens of that State by freezing private property in a nonproductive state years in advance of physically taking such property. No compensation for such takings will be offered or will be necessary. Owners of such property will be forced to incur expenses and pay taxes to preserve their ownership without any right to sell the property or to recover monies so expended. Petitioners cannot conceive that such conditions can result under the Federal Constitution.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

F. Burton Howard
336 South 3rd East
Salt Lake City, Utah
Attorney for Petitioners

APPENDIX

OPINIONS AND JUDGMENT BELOW

I. Order of Involuntary Dismissal

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF UTAH IN AND FOR THE COUNTY OF SALT LAKE

Civil No. 144441

STATE OF UTAH, by and through its ROAD COMMISSION,
Plaintiff,

v.

BETTILYON'S, INC., NOLAND OSWALD and SECURITY TITLE COMPANY, *Defendants.*

The special trial in the above-mentioned matter relating to particular claims for damage to the defendants having come on for hearing at a regular setting before the Court on the 26th day of August, 1964, the plaintiff being represented by its counsel, ROBERT S. CAMPBELL, JR., Special Assistant Attorney General, and VERDEN E. BETTILYON of the firm of Kirton and Bettilyon, appearing on behalf of the defendants, Bettilyon's, Inc., and Noland Oswald, and evidence having been offered by the parties and received by the Court with respect to said claims for damages on the part of the defendants, and the plaintiff at the close of the defendants' case and of all of the evidence, having moved the Court for an Order of Involuntary Dismissal pursuant to Rule 41 (b) Utah Rules of Civil Procedure, and argument having been submitted by counsel with respect thereto, and, by the Court, taken under advisement, and all things in law and fact in anywise appertaining to the premises of the de-

fendants' claims for relief having been considered, and the Court having made and entered its Findings of Fact and Conclusions of Law with respect thereto and good cause now appearing therefore;

IT IS ORDERED, ADJUDGED AND DECREED that the motion of the State of Utah for Involuntary Dismissal of the claims for relief of the defendants submitted at the special trial on the 26th day of August, 1964, be and are hereby dismissed, the same failing to state claimed upon which relief may be granted.

DATED this 31st day of August, 1964.

(SEAL) BY THE COURT:

MARCELLUS K. SNOW, *District Judge*

Attest: ALVIN KEDDINGTON, *Clerk*

By BOYD L. GARDINER, *Deputy Clerk*

Filed in the Clerk's Office, Salt Lake County, Utah, Aug. 31, 1964.

ALVIN KEDDINGTON, *Clerk, Third District Court*

By BOYD L. GARDINER, *Deputy Clerk*

II. Final Order of Condemnation

(As to All Defendants)

Civil No. 1444441

Project No. I-415-9(4)297 Parcels No. 207:A and 207:E

Total Judgment: $130,392.27

IN THE THIRD DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,
Plaintiff,

v.

BETTILYON'S, INC., NOLAND OSWALD and SECURITY TITLE
COMPANY, *Defendants.*

It appearing to the Court and the Court now finds that heretofore, on the 29th day of June, 1964, this Court made and entered its judgment on the verdict in the above entitled proceeding, and said judgment is hereby referred to; and

It appearing to the Court and the Court now finds that pursuant to the law and the said judgment the plaintiff did pay said judgment to the defendants, Bettilyon's, Inc., Nolan Oswald, and Security Title Company, together with all costs and interest required by said judgment to be paid; and

It further appearing to the Court that the plaintiff has made all payments as required by law and order of this Court, and that this is not a case where any bond was required to be given, and all and singular the law in the premises being by the Court understood and fully considered,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the parcels of land hereinafter described are hereby taken and condemned in fee simple title for the purpose described and set forth in the plaintiff's complaint and amended complaint, i.e., for the use of the plaintiff, the State of Utah, for highway purposes.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said use is a public use and an use authorized by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this Final Order of Condemnation be filed with the County Recorder of Salt Lake County, State of Utah, and thereupon the property interests hereinafter referred to and set forth shall vest in fee simple title in the plaintiff. The following is a description of the property so ordered and condemned, as hereinabove provided, which is hereby vested in fee simple title in the plaintiff, all of such property being situated in Salt Lake County, State of Utah, and is more particularly described as follows:

PARCEL No. 415-9; 207:A

A parcel of land in fee for a freeway known as Project No. 415-9 being part of an entire tract of property situated in the NE¼ of the NW¼ of Section 23, T. 2 S., R. 1 E., S.L.M. The boundaries of said parcel of land are described as follows:

Beginning at the SW coroner of said entire tract of property which point is the SW corner corner of said NE¼ of the NW¼; thence N. 0° 05′ 30″ E. 755.0 ft.; thence Northeasterly 70 ft., more or less, along a straight line to a point 50.0 ft. perpendicularly distant northwesterly from the line of survey of a northwesterly ramp road of said project at Engineer Station 337+71.2; thence N. 24° E. 300.8 ft.; thence Northwesterly 169 ft., more or less, to the west line of said NE¼ of the NW¼ at a point 133.0 ft. south from the NW corner of said entire tract of property; thence N. 0° 05′ 30″ E. 133.0 ft.; thence Southeasterly 1310 ft., more or less, along the north boundary line of said entire tract of property to a point on the line of survey of the relocated Cottonwood Canyon Road at Engineer Station 22+50; thence E. 36° 22′ W. 50.0 ft.; thence N.

53° 38′ W. 397 ft., more or less, to a point 40.0 ft. perpendicularly distant southeasterly from the line of survey of a frontage road of said project; thence S. 47° 52′ W. 340 ft., more or less; thence Southwesterly 552.3 ft. along the arc of a 2824.79 foot radius curve to the left; thence Southerly 118 ft., more or less, along the arc of a 110 foot radius curve to the left to the south line of said NE¼ of the NW¼; thence N. 89° W. 20 ft., more or less, to the point of beginning. The above described parcel of land contains 11.58 acres, more or less.

Together with any and all rights or easements appurtenant to the remaining portion of said entire tract of property by reason of the location thereof with reference to said freeway, including, without limiting the foregoing, all rights of ingress to or egress from said remaining portion contiguous to the lands hereby conveyed, to or from said freeway.

PARCEL No 415-9; 207:E

An easement to construct a channel change and appurtenant parts thereof, upon part of an entire tract of property situated in the NE¼ of the NW¼ of Section 23, T. 2 S., R. 1 E., S.L.M. The boundaries of said part of an entire tract of property are described as follows:

Beginning at the intersection of a southeasterly right of way line of a frontage road at a highway known as Project No. 415-9 and the southwesterly right of way line of the relocated Cottonwood Canyon Road; thence S. 47° 52′ W. 95.0 ft.; thence S. 58° 38′ E. 58.0 ft.; thence N. 31° 22′ E. 90 ft., more or less, to said right of way line of said relocated Cottonwood Canyon Road; thence N. 53° 38′ W. 30 ft., more or less, to the point of beginning, containing 0.091 acre, more or less.

Dated this ..... day of ....., 1964.

.....

DISTRICT JUDGE

III. Opinion of the Supreme Court of Utah

No. 10277

STATE OF UTAH, by and through its ROAD COMMISSION,
Plaintiff,

v.

BETTILYON'S, INC., NOLAND OSWALD and SECURITY TITLE COMPANY, *Defendenats*.

WADE, Justice:

The Utah State Road Commission, respondent herein, brought this action on July 22, 1963, to condemn about twelve acres of an approximately thirty-six acre wooded tract of land located at about 6200 South and Holladay Boulevard in Salt Lake County and which land was part of a contemplated subdivision by appellants, Bettilyon's, Inc. and Nolan Oswald, to be known as the Random Woods Subdivision. The jury awarded appellants damages in the sum of $130,000.00, which has been paid. This appeal is from the refusal of the court to include within the items of damages which could be considered by the jury in making its award the costs incurred by appellants in the planning and platting of the Random Woods subdivision, and the taxes, interest and other items of expense incurred before the Utah State Road Commission commenced this action.

From the record it appears that the entire thirty-six acres were purchased in 1959 by the appellants herein for $170,000.00 plus commissions upon which a down payment was made with the balance to be paid in four annual installments with interest thereon. In June 1960 a prelimi-

nary plat for a proposed subdivision to be known as the Random Woods Subdivision was submitted by the appellants to the Planning Commission of Salt Lake County and approved by that Commission. On December 8, 1960 before any further action on the proposed Random Woods Subdivision was taken, the Salt Lake County Planning Commission, acting under the provisions of Salt Lake County Ordinance 9-7-3, as amended,[1] informed the Utah State Department of Highways of appellants' proposed subdivision of the tract of land involved herein. The Utah State Department of Highways thereafter informed the Salt Lake County Planning Commission that some of the land in that tract would be needed for a right-of-way for the construction of a contemplated southwest belt route and suggested it restrict development in this area so as to keep the public investment at a minimum. On January 10, 1961 the Planning Commission deferred action on appellants' final subdivision plat for one year and it did not approve this plat until requested by appellants to do so on May 28, 1963. Appellants did not make this request sooner because they were attempting to negtiate a sale with the State Road Commission of the land which was ultimately condemned.

It is appellants' claim that when the State Road Commission requested the County Planning Commission to de-

[1] 9-7-3 Parks, School Sites and Other Public Spaces: (1) Provisions for Public Use. When a preliminary plat is submitted for the division of property a part or all of which is deemed suitable by the Planning Commission for schools, parks, playgrounds or other areas for public use, the Planning Commission shall apprise the proper agency in writing of the property owner's intent to subdivide. If any such areas proposed for public use have not been freely dedicated to the public by the owner or have not been purchased at a fair price by the proper agency within one (1) year from the date of notification, such areas may be divided into lots and sold in accordance with the provisions of this Title.

fer action on their application for subdivision of the lands involved herein which resulted in a loss of the use of their lands during the three and one-half years waiting period before condemnation proceedings were commenced by the respondent, that this deferment amounted to a "taking" of their property at that time and the expenses incurred for platting, taxes, interest from January 10, 1961 and other items of expense during that period should have been included as items which the jury should have considered in arriving at the damages to be awarded appellants for the taking of their land.

Such a contention ignores the provisions of our eminent domain statutes. This court has held that under those statutes the measure of compensation or damages is the actual value of the land on the date the summons is served or the land actually taken, which is the case here. That this means that the measure of compensation of land actually taken is the market value of the land on that date, no more and no less. Interest accrues only from the time of actual taking of possession by occupation or entry or upon final judgment and order of condemnation.[2]

Affirmed.

WE CONCUR:

F. HENRI HENRIOD, *Chief Justice*

ROGER I. McDONOUGH, *Justice*

J. ALLAN CROCKETT, *Justice*

E. R. CALLISTER, JR., *Justice*

[2] Oregon Short Line R. Co. v. Jones, 29 Utah 147, 80 P. 732, and State v. Peek, 1 Utah 2d 263, 265 P. 2d 630. See also Sec. 3599, Revised Statutes of Utah, 1898, and Sec. 78-34-11, U.C.A. 1953.

IV. Judgment of the Supreme of Court of Utah

IN THE SUPREME COURT OF UTAH

Regular May Term, 1965

September 9, 1965

No. 10277

STATE OF UTAH, by and through Its ROAD COMMISSION,
Plaintiff and Respondent,

v.

BETTILYON'S, INC., NOLAN OSWALD and SECURITY TITLE COMPANY, *Defendants and Appellants*

JUDGMENT

This Cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the District Court be, and the same is, affirmed.